Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,
Petitioner,

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court, in conflict with decisions of the United States Court of Appeals for the Fifth Circuit and other courts, can create a special evidentiary rule of documentary proof to preclude the defense of federal preemption under the Federal Rail Safety Act of 1970 and 23 C.F.R. § 646.214?

2. Whether the Mississippi Supreme Court erred in holding, in direct conflict with this Court's decision in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), that changed circumstances at a crossing following the installation of federally funded traffic control devices terminate the federal preemption of a railroad's duty under state tort law to install adequate warning devices at rail-highway crossings?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are the petitioner and respondents listed in the caption.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a wholly owned subsidiary of Kansas City Southern Industries, Inc. Petitioner further states that no publicly traded company owns ten percent or more of the stock of Kansas City Southern Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kansas City Southern Railway Company, Inc., ("KCS") respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court in this case.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court (App. 1a-15a) was entered on February 8, 2001 and has been designated by the Mississippi Supreme Court for publication, but has not yet appeared in the Southern Reporter, Second Series. It is currently available at 2001 WL 107864 (Miss. Feb. 8, 2001). The order denying the petition for rehearing (App. 20a) was entered on May 10, 2001, and is not reported. The order of the Circuit Court of the First Judicial District of Hinds County overruling petitioner's motion for summary judgment on grounds of preemption (App. 18a-19a) was entered on June 4, 1998, and is not reported. The order of the Circuit Court granting in part and denying in part petitioner's motion for judgment notwithstanding the verdict or for new trial (App. 16a-17a) was entered on March 4, 1999, and is not reported.

JURISDICTION

The opinion and final judgment of the Mississippi Supreme Court were entered on February 8, 2001. The Mississippi Supreme Court denied KSC's petition for rehearing on May 10, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e), 130, and 409 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) and are reprinted in App. 21a-27a. The regulation at issue in this case is 23 C.F.R. § 646.214 and is reprinted in App. 27a-28a.

STATEMENT OF THE CASE

In *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344, 352-59 (2000), this Court elucidated the standards for federal preemption of state tort law claims alleging that a railroad installed or maintained inadequate warning devices at railway-highway crossings. This Court held that the installation of federally funded warning devices at crossings is the touchstone of federal preemption under the Federal Rail Safety Act of 1970 ("FRSA") and 23 C.F.R. § 646.214(b)(3) and (4). *Shanklin*, 529 U.S. at 353-54. The "national uniformity" sought by Congress in enacting FRSA, see 49 U.S.C. § 20106, will only be achieved if both state and federal courts apply this standard in a uniform manner.

In this case, however, the Mississippi Supreme Court sought to avoid the result mandated in *Shanklin* by inventing a new, heightened evidentiary standard that is to be applied solely to a railroad's preemption claim and that is contrary to settled evidentiary principles that apply generally in Mississippi state courts. In so doing, the Mississippi Supreme Court created a square conflict with the United States Court of Appeals for the Fifth Circuit (the jurisdiction of which includes Mississippi) as well as with other federal and state courts. Moreover, in direct conflict with *Shanklin*, the Mississippi Supreme Court held in the alternative that a change in circumstances at the crossing (*i.e.* the apparent absence at the time of the accident of a previously installed advance warning sign that it was the duty of the state highway

to maintain) effectively terminated federal preemption as to the railroad. This Court should grant certiorari in order to resolve these conflicts and to achieve national uniformity in the area of railroad safety.

A. Statutory And Regulatory Background

The safety of public railway-highway grade crossings[1] has long been a matter of federal concern. From the inception of the federal-aid highway program, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress has authorized federal funds for States to use in improving those crossings. From as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[2]

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[1] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal R.R. and Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

[2] Such provisions served not only to protect motor vehicle drivers and passengers, but the railroads and their passengers: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from the dangers incident to motor transportation." *Nashville, Chattanooga, & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing Accidents Involving Ry. Trains and Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[3] enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[4] The purpose of the FRSA was "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Shanklin*, 529 U.S. at 348. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force a[ny] law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

The Secretary's mandated report to Congress[5] emphasized the need for passive warning devices at public crossings even

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[3] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[4] The FRSA was originally codified at 45 U.S.C. §§ 421 to 444. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See Id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[5] Section 433 of FRSA, in addition to requiring the Secretary to undertake solutions to the grade crossing problem pursuant to his authority under existing law, mandated that the Secretary submit to the President for

where active devices (such as gates and flashing lights) were not justified and recommended to Congress that it expand federal funding to the States to install protective devices at public crossings. See *1972 Crossings Report* at ii-iii. In response to the Secretary's report, Congress enacted section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[6] This statute specifically grants States federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). This federal-state program is known as the Section 130 Crossing Program.

Soon after the passage of the 1973 Act, the FHWA promulgated regulations to govern federal aid projects "for the elimination of hazards of railroad-highway crossings." 23 C.F.R. § 646.200(b).[7] In addition to the general regulations governing state programs for evaluating railway crossing hazards and developing remedial projects, see 23 C.F.R. pt. 924, the FHWA made States "subject to further regulations governing the use of particular warning devices." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 666-67 (1993).

Among those regulations is a rule prescribing what will constitute "[a]dequate warning devices" and specifying that where "[f]ederal-aid funds participate in the installation of the

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transmittal to Congress a comprehensive study of the grade crossing program, together with his recommendations for eliminating and protecting railroad crossings. 45 U.S.C. § 433 (repealed 1994).

[6] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

[7] The Secretary delegated his statutory power to administer those Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

devices" at rail-highway crossings specified devices must be installed or the project approved by FHWA. 23 C.F.R. § 646.214(b)(3)-(4) (emphasis omitted). No federal funds may be expended until there is compliance with all federal regulations, including § 646.214. See 23 C.F.R. § 630.106(a).

B. This Court's Decisions In *CSX Transportation, Inc.* v. *Easterwood* And *Norfolk Southern Railway* v. *Shanklin.*

In *CSX Transportation, Inc.* v. *Easterwood*, this Court declared that the federal regulations defining "adequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) did "cover[] the subject matter of," 49 U.S.C. § 20106, state tort law requiring due care in the selection of warning devices. 507 U.S. at 670.[8] Sections 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Id.*

The Court accordingly stated a bright-line test for federal preemption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

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[8] FRSA pre-emption applies to any rule, regulation, or standard issued by the Secretary of Transportation that relates to railroad safety, and not just those issued under the authority of the FRSA. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993). As this Court noted in *Easterwood*, however, 23 C.F.R. § 646.214(b)(3) and (4) were promulgated in part under the FRSA. *Id.*

Id. at 671 (emphasis added). The *Easterwood* Court found no preemption in the case before it only because the regulations did not apply: *i.e.*, federal funds did not participate in the installation at the crossing in question, *id.* at 673, and it was not contended that the project was part of a federal-aid highway project, *id.* at 670 n.10.

Because lower courts could not agree on how to apply the *Easterwood* bright-line rule, this Court clarified the rule in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). In *Shanklin*, the lower court had determined that the plaintiff's inadequate warning device claim was not preempted by Sections 646.214(b)(3) and (4), despite being presented with evidence that federal funds had been used to install warning devices at the intersection in question, because there was no evidence that the state had conducted a diagnostic study of that intersection and because federal funding of "'minimum protection'" did not indicate that the FWHA had conducted an "individualized determination of adequacy." *Id.* at 351. This Court rejected each of these claims and concluded that preemption of relevant state tort law claims is final, complete, and permanent from the time that federally funded warning devices are installed at a given intersection.

Reaffirming its holding from *Easterwood*, the Court emphasized "that the requirements spelled out in (b)(3) and (4) are *mandatory* for all warning devices installed with federal funds." *Id.* at 353. Thus, for *any* devices installed with federal funds, either "§ 646.214(b)(3) or (4) 'is applicable' and determines the type of warning device that is 'adequate' under federal law." *Id.* at 354. Therefore, "once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating," state law, including state tort law, is preempted. *Id.*

Shanklin contained three discrete holdings based on this conclusion. First, it specifically rejected the claim that preemption only occurs "where the warning devices have

been selected based on diagnostic studies and particularized analyses of the conditions at the crossing." *Id.* at 355-56. Second, it concluded that preemption is appropriate for crossings that are allegedly "[u]nder the 'minimum protection' program [such that] States obtain federal fund[ing] merely to equip crossings with advance warning signs and reflectorized crossbucks . . . without any judgment as to whether the signs are adequate." *Id.* The regulations have no exceptions for either devices installed without a diagnostic study or for "minimum protection" devices; rather, they cover *any* crossing at which federal funds are used to install *any* warning devices. Third, it made clear that preemption is final and permanent at the time of the installation regardless of whether subsequent developments have affected the safety of the crossing—"[w]hether the State should have originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Id.* at 358.

Under *Shanklin*, the crossing is federalized and the duty of maintaining the safety of the crossing belongs exclusively to the State and the FHWA under the Section 130 Crossings Program. However, "[w]hat the States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." *Id.*

C. This Litigation

On July 18, 1995, respondent J.C. Johnson was injured in an accident at the Johnson Quarters Road crossing in Pelahatchie, Rankin County, Mississippi, involving his automobile and one of petitioner KCS's trains. J.C. Johnson, joined by his wife, respondent Kerry Lynn Johnson, filed a state court complaint asserting various tort claims against KCS and the engineer who was operating KCS's train at the time of the accident. One of respondents' tort claims asserted

that KCS was negligent in failing to install active signalization at the Johnson Quarters Road crossing.

On January 23, 1998, KCS moved for partial summary judgment as to the adequate signalization claim on the grounds that the claim was preempted by federal and state law because traffic control devices had been installed with federal funds at the crossing. In support of that motion, KCS filed a sworn and notarized affidavit from Newton McCormick, Jr. ("McCormick"), then State Rail Engineer of the Rails Division of the Mississippi Department of Transportation ("MDOT"). In his affidavit, McCormick attested that he had personal knowledge of the use of federal funds in erecting warning signs on crossings over KCS's tracks and that, in 1981-83, federal funds were used to install an advance warning sign and inventory marker at the Johnson Quarters Road crossing. McCormick also attested that the FHWA approved both the use of federal funds at the Johnson Quarters Road crossing and the actual installation of the advance warning sign at that crossing. McCormick attached to his affidavit documentation establishing that the Johnson Quarters Road Crossing, DOT identification 305120L, received both an inventory marker and an advance warning sign. KCS specifically relied on McCormick's affidavit in both its motion for summary judgment and its itemization of undisputed material facts, filed pursuant to Miss. Cir. & Cty. Ct. R. 4.03(2).[9]

Respondents did not dispute the facts asserted in McCormick's affidavit and relied upon by KCS at summary judgment. Indeed, respondents filed *no* Rule 4.03(2) response to KCS's itemization of undisputed facts. Notwithstanding

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[9] Rule 4.03(2) reads, in relevant part: "Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagreement that such facts are undisputed and material."

these undisputed facts, the trial court denied KCS's motion for partial summary judgment. App. 18a-19a.

At trial, respondents called McCormick as a witness. On cross-examination, McCormick testified, consistently with his affidavit, that federal funds were spent on placing an advance warning sign at the Johnson Quarters Crossing; he also testified that the only funds used by the State to put up warning devices were federal funds. See Trial Tr. at 149-50.[10] Respondents again failed to dispute McCormick's testimony regarding the federal funding for signage at the Johnson Quarters Crossing. Notwithstanding this undisputed testimony, the trial court submitted the case—including the inadequate signalization claim—to the jury, which found for the respondents in the amounts of $2.5 million for J.C. Johnson and $1.0 million for Kerry Lynn Johnson.

The trial court denied KCS's motion for judgment notwithstanding the verdict or, alternatively, for new trial as to liability and as to the amount of damages awarded to J.C. Johnson. Kerry Lynn Johnson ultimately accepted remittitur of her damages to $500,000 after the trial court concluded that her verdict was influenced by bias and passion. KCS filed a timely appeal of the judgment.

D. Decision Of The Mississippi Supreme Court

A central issue before the Mississippi Supreme Court was federal preemption of the inadequate warning-device claim. KCS placed before the court the undisputed evidence that federal funds were used to place an advance warning sign at the Johnson Quarters Road crossing. Despite this undisputed evidence, as well as this Court's intervening decision in *Shanklin*, the Mississippi Supreme Court affirmed the trial court.

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[10] Notably, the trial court overruled respondents' objection to McCormick's qualifications to testify as to what the federal government did relative to rail safety. Trial Tr. at 148.

The court rejected KCS's federal preemption claim due to an alleged lack of evidence that federal funds were spent on warning devices at the Johnson Quarters Road crossing. See App. 7a. Even though KCS brought its preemption claim on the basis of the federal funding of the installation of an advanced warning sign, as McCormick testified, the court, examining the evidence of record regarding crossing conditions at the time of the accident, rejected preemption because it found no evidence of any sign at the crossing other than a cross-buck (the traditional X-shaped sign with the words "RAILROAD CROSSING" on crossing boards). *Id.* Alternatively, the Court dismissed McCormick's affidavit and testimony as insufficient proof that federal funds participated in the installation of advance warning signs at the crossing, stating:

> KCS would like us to rely on the memory of one retired MDOT employee who claims to remember federal funds being spent at this particular crossing. We will not rule that federal funds have been spent where no documentation was produced in support thereof.

Id.[11]

KCS filed a timely motion for rehearing on the ground that the Mississippi Supreme Court's preemption analysis conflicted with this Court's decisions in *Easterwood* and *Shanklin* and that its rejection of McCormick's affidavit and testimony conflicted with both other courts and with Mississippi state law on statements made under oath. On May 10, 2001, the Mississippi Supreme Court denied without comment the motion for rehearing. App. 18a.

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[11] The court's rejection of KCS's documentary proof is most curious, as the documentation attached to McCormick's affidavit includes not only a listing of devices installed at this and other crossings, but also includes the federally funded project number—RRP-0061(4). McCormick Aff. at Ex. A (R. 408-09).

REASONS FOR GRANTING THE PETITION

Due to respondents' failure to dispute McCormick's testimony, either at summary judgment or at trial, this case presents an unusually clean set of facts for deciding the important federal law questions presented. This case is not the first one involving a lower court that has attempted to evade the strictures of federal preemption under the FRSA. Indeed, in *Norfolk Southern Railway* v. *Shanklin*, this Court rejected a statutory construction adopted by two circuit courts that "contradict[ed] the . . . plain text" of 23 C.F.R. § 646.214(b)(3) and (4). 529 U.S. 344, 356 (2000).

This case, however, presents questions that are significant not only in the area of railway safety regulation, an area in which national uniformity is both necessary and mandated by federal statute, 49 U.S.C. § 20106, but also for all other areas of federal preemption which require factual findings. First, this Court should grant certiorari in order to resolve whether state courts may create and apply special, heightened evidentiary rules in federal preemption cases, rules which in many instances will nullify legitimate preemption defenses and create undue variation from state to state. Second, this Court must also reaffirm its rule in *Shanklin* that federal preemption of a railroad's state-law duty to provide adequate warning devices at crossings is forever preempted when the crossing is federalized under the Section 130 program by the installation of warning devices with federal funds. The rule established by the Mississippi Supreme Court that a subsequent change in circumstances (such as a missing sign) deprives the railroad of a preemption defense, and reimposes state law duties of care, creates chaos for railroads. Particularly given that, in Mississippi as elsewhere, the State, rather than the railroads, has the responsibility to inspect and maintain signs on highway approaches to crossings, railroads will have no notice of when they are subject to state law or not, and no practical ability to ensure that the federal

protections created by FRSA and the FHWA regulation are preserved.

I. THE IMPOSITION OF SPECIAL EVIDENTIARY REQUIREMENTS TO ESTABLISH THE FEDERAL DEFENSE OF *EASTERWOOD* PREEMPTION CONFLICTS WITH THE DECISIONS OF THE FIFTH CIRCUIT AND OTHER COURTS.

In rejecting KCS's federal preemption defense, the Mississippi Supreme Court dismissed uncontradicted testimony, supported by documentation and establishing that federal funds were used to install an advance warning device at the Johnson Quarters Road crossing. Indeed, respondent failed to challenge McCormick's testimony that (1) he had personal knowledge of the use of federal funds to install the warning device at issue,[12] (2) that federal funds were, in fact, used to install the device, and (3) that documentation confirmed that the federal funds were used to install the device. Similarly, the trial court made no finding rejecting any of McCormick's testimony or concluding that it was not credible; indeed, the trial court *overruled* respondent's objection that McCormick was unqualified to testify as to the federal government's actions "relative to railroads." Trial Tr. at 148.

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[12] In addition to averring in his affidavit that he had personal knowledge of the federal funding of the relevant warning device and to testifying at trial as to his extensive experience as state rail engineer for the State of Mississippi with federal funding of warning devices, *see* Trial Tr. at 141-42, McCormick specifically testified at trial that he participated in the diagnostic team which evaluated the very crossing at issue in this case and which determined what warning devices to place at that crossing, *see id.* at 151-52. Thus, even if it was appropriate—which it was not—for the Mississippi Supreme Court to engage in a *post hoc* evaluation of McCormick's credibility, the clear, undisputed evidence in this case is that McCormick's testimony was more than amply supported by his personal knowledge.

Notwithstanding the lack in the trial record of either evidence or credibility conclusions undermining McCormick's testimony, the Mississippi Supreme Court chose to disregard that testimony. After first misstating the standard for FRSA preemption, it dismissed McCormick as "one retired MDOT employee who claims to remember federal funds being spent at this particular crossing." App 7a.[13] It then incorrectly asserted that KCS had failed to produce documentation in support of its claim that federal funds had been used to install a warning signal at the Johnson Quarters Road crossing—despite the fact that McCormick *had* attached to his affidavit documentation fully supporting his testimony.

The Mississippi Supreme Court's disregard of McCormick's testimony squarely conflicts with the treatment accorded by many other courts to similar evidence. Indeed, in a strikingly similar case, the Fifth Circuit concluded that an affidavit from McCormick—the same witness as in this case—similarly supported by MDOT records is ample evidence to "establish[] that federal funds did in fact participate in the installation of warning devices" at a given crossing. *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995). Similarly, the Southern District of Mississippi, subsequently affirmed by the Fifth Circuit, granted summary judgment as to an inadequate warning-device claim on federal preemption grounds where the defendant submitted an affidavit based solely on McCormick's personal knowledge that federal funds had been used to install a crossbuck at a given crossing. See *Williams* v. *CSX Transp., Inc.*, 925 F. Supp. 447, 451 (S.D. Miss. 1996) (also rejecting counter-evidence that a similar warning device was in place prior to the federally funded project), *aff'd without opinion*, 139 F.3d

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[13] KCS notes that, not only is there no support for the claim that retirement disqualifies a witness from testifying, McCormick's affidavit makes clear that he was *not* retired at the time that he attested to the facts at issue in this case. *See* McCormick Aff. at 1.

899 (5th Cir. 1998). In addition to conflicting with the Fifth Circuit, and thereby, with the federal courts throughout the State of Mississippi,[14] the Mississippi Supreme Court decision also conflicts with numerous other courts that have concluded that similar affidavits, accompanied by similar documentation, are sufficient to establish that federal funds were used to install warning devices at relevant rail-highway crossings. See, *e.g.*, *O'Bannon* v. *Union Pac. R.R.*, 169 F.3d 1088, 1090 (8th Cir. 1999); *Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899, 903 (8th Cir. 1998); *Cochran* v. *CSX Transp., Inc.*, 112 F. Supp. 2d 733, 737-38 (N.D. Ind. 2000); *Powers* v. *CSX Transp., Inc.*, 97 F. Supp. 2d 1297, 1299 (S.D. Ala. 2000); *McDaniel* v. *Southern Pac. Transp.*, 932 F. Supp. 163, 167 (N.D. Tex. 1995).

Beyond conflicting with the Fifth Circuit and other courts, the Mississippi Supreme Court's treatment of McCormick's affidavit is contrary to its own evidentiary law, and thus, constituted an impermissible and burdensome new rule specially created to be applied to federal preemption under FRSA and Section 646.214(b)(3) and (4). Under Mississippi

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[14] As the Mississippi Court of Appeals noted in *Pearson* v. *Columbus & Greenville Railway*, "[i]t is unnecessarily disruptive to apply a different interpretation of a federal statute in state court than is applied in our state's federal courts, at least when the interpretation is reasonable." 737 So. 2d 390, 397 (Miss. Ct. App. 1998). The wisdom of that statement is well-illustrated in this case, where the conflicting rulings of the Fifth Circuit and the Mississippi Supreme Court means that the availability of federal preemption under FRSA will turn on the availability of a federal forum and that plaintiffs will choose the state forum solely to destroy preemption. If for no other reason, this Court should grant certiorari in order to resolve this unacceptable situation. *See, e.g.*, *Norfolk & W. Ry.* v. *Hiles*, 516 U.S. 400, 402-03 (1996) (stating that certiorari was granted in order to resolve circuit split between Illinois Appellate Court and other courts, including the Seventh Circuit, regarding application of the Safety Applicance Act).

Rule of Civil Procedure 56(e),[15] affidavits considered at summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." In other contexts, the Mississippi Supreme Court has applied that standard to uphold summary judgment based on uncontradicted affidavits. See, *e.g.*, *Magee* v. *Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 186-87 (Miss. 1989) (state law negligence claim); see also *Koestler* v. *Mississippi Coll.*, 749 So. 2d 1122, 1126 (Miss. Ct. App. 1999). Indeed, under Mississippi law, in the absence of evidence (*e.g.*, prior inconsistent testimony under oath) that an affidavit is a sham, "[t]here should be a strong presumption of validity of anyone's statement under oath." *Mowdy* v. *State*, 638 So. 2d 738, 743 (Miss. 1994); see also *Templeton* v. *State*, 725 So. 2d 764, 768 (Miss. 1998). Similarly, Mississippi courts have long held that:

> Uncontradicted or undisputed evidence should ordinarily be taken as true by the triers of the facts. More precisely, evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously, discredited, disregarded, or rejected, even though the witness is a party or interested; and unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact.

Lucedale Veneer Co. v. *Rogers*, 53 So. 2d 69, 75 (Miss. 1951) (en banc). Because McCormick's affidavit, like his trial testimony, meets all of the requirements of Rule 56(e), is

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[15] Notably, Mississippi Rule of Civil Procedure 56 is modeled after Federal Rule of Civil Procedure 56. *See* Comment, Miss. R. Civ. P. 56. This fact makes the conflict in this case even more significant, given that the various courts involved in the conflict are applying the same basic rule of law.

testimony taken under oath, and was both uncontradicted and "not so clearly lacking in trustworthiness to authorize its rejection," both the trial judge and the Mississippi Supreme Court should have "accept[ed] it as true" under Mississippi's normal evidentiary rules. *Reeves Royalty Co.* v. *ANB Pump Truck Serv.*, 513 So. 2d 595, 599 (Miss. 1987). Instead, the Mississippi Supreme Court inappropriately created a special evidentiary rule in order to preclude federal preemption.

By creating such a special evidentiary rule, the decision below not only conflicts with numerous courts, but also violates the core principle, consistently upheld by this Court, that "[a] state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934). This principle is contained in the Supremacy Clause of the United States Constitution, which expressly states that the United States Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Thus,

> [i]t must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity.

Hauenstein v. *Lynham*, 100 U.S. 483, 490 (1879). Accordingly, this Court has long accepted jurisdiction to prevent State courts from applying discriminatory rules to claims arising under federal law. See, *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 393 (1947) (reversing State court decision refusing to exercise jurisdiction over cause of action under federal act where the cause of action was within the scope of the State courts' authority). Of particular note is a series of cases addressing State courts' treatment of claims under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-59 ("FELA"). In

the FELA cases, this Court consistently rejected *discriminatory* treatment of claims grounded in federal law, while permitting those claims to be subject to *neutral* treatment pursuant to procedural rules of general application. Compare *McKnett*, 292 U.S. at 233-34 (rejecting special jurisdictional rule applied solely to FELA claims), and *Mondou* v. *New York, New Haven, & Hartford Ry.*, 223 U.S. 1, 57 (1912) (same) with *Missouri ex rel. S. Ry.* v. *Mayfield*, 340 U.S. 1, 4 (1950) (upholding general jurisdiction rule as applied to FELA claims), *Herb* v. *Pitcairn*, 324 U.S. 117, 123 (1945) (same), and *Douglas* v. *New York, New Haven, & Hartford R.R.*, 279 U.S. 377, 387-88 (1929) (same).

These principles are equally applicable to the defense of federal preemption—which is itself a means of enforcing the Supremacy Clause. *Mondou*, 223 U.S. at 54-55. Thus, just as this Court has refused to permit State courts to create special defenses applicable solely to a federal cause of action, *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 371 (1990), this Court should grant certiorari in this case in order to prevent States from creating special rules applicable solely to defenses created by federal law. In either case, "[t]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.*

* * * * *

The serious problems outlined above are exacerbated by the fact that the decision below will, as a practical matter, often preclude federal preemption under FRSA and Section 646.214(b)(3) and (4). That will certainly be the case in Mississippi: KCS in this case diligently sought all available project records from the MDOT and the local FHWA office and was provided all that apparently existed. Federal preemption and the railroad rights, duties, and liabilities cannot depend on the vagaries of state agency record retention from projects that may be decades old. If a court

may reject first-hand witness testimony that is accompanied by supporting documentation, it is hard to know how a railroad can prove preemption consistently in Mississippi and many other states.

Because some project records may no longer exist and other records may fall within the statutory exclusion from evidence of certain documents and testimony relating to evidence "compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings," 23 U.S.C. § 409, permitting courts to reject testimony, such as that offered by McCormick in this case, will create an impermissible bar to federal preemption in contravention of express congressional intent.[16]

II. THE MISSISSIPPI SUPREME COURT'S HOLDING THAT *EASTERWOOD* PREEMPTION IS TERMINATED BY THE CHANGED CONDITIONS AT THE CROSSING IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *SHANKLIN*.

In an alternative holding, the court below inappropriately rejected federal preemption on the ground of changed circumstances. The court below stated that there were two warning devices that could potentially serve to trigger federal preemption under FRSA and 23 C.F.R. § 646.214(b)(3) and (4): namely, a crossbuck and an advanced warning sign separate from the crossbuck. App. 7a.[17] The court rightly

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[16] This case is not the first in which a State court has applied a heightened evidentiary standard in the context of FRSA preemption. *See Duncan* v. *Kansas City S. Ry.*, 773 So. 2d 670, 680 (La. 2000) (requiring that evidence establish the "unequivocal conclusion" that warning devices were installed with federal funds).

[17] The Federal Highway Administration's *Manual on Uniform Traffic Control Devices for Streets and Highways* lists railroad advanced warning signs as traffic control devices. *See* Federal Highway Admin., U.S. Dep't of Transp., *Manual on Uniform Traffic Control Devices for Streets and*

pointed out that there was no evidence that federal funds participated in the installation of the crossbuck, *id.*, but KCS has never attempted to demonstrate that the crossbuck was installed with federal funds or that it could serve as the basis for a preemption defense. Instead, as the court below acknowledged, KCS "consistently refer[red] to an advanced warning sign for which federal funds were spent." *Id.* KCS did so in reliance on McCormick's unequivocal and uncontradicted testimony, supported by project records, that an advanced warning sign was installed at the crossing with federal funds. Before even considering the sufficiency of McCormick's testimony, the Mississippi Supreme Court rejected KCS's claim of federal preemption as to the federally funded warning sign on the ground "there is no evidence of its existence" at the time of the accident. *Id.* Thus, the court below held in the alternative that, notwithstanding the uncontradicted evidence that the warning sign had previously been installed at the crossing with federal funds, the absence of the sign at the time of the accident precluded KCS from asserting a preemption defense.

The Mississippi Supreme Court's conclusory rejection of federal preemption on the ground of changed circumstances directly conflicts with this Court's holding in *Shanklin*. Assuming for the sake of argument that the court below was correct in concluding that the sign may not have existed at the time of the accident, it was flatly incorrect in treating that alleged fact as relevant to the federal preemption analysis under FRSA and Section 646.214(b)(3) and (4). To the contrary, this Court in *Shanklin* specifically held that federal preemption is triggered at the time that warning devices are installed at a given crossing using federal funds and cannot lapse thereafter. 529 U.S. at 359. Thus, "whether conditions at the crossing have since changed . . . is immaterial to the

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Highways § 8B-3 (1988) ("*MUTCD*"). Notably, *Shanklin* involved similar advanced warning signs, as well as reflectorized crossbucks. 529 U.S. at 350.

pre-emption question," *id.* at 358. The installation of federally funded devices federalizes the crossing and shifts the duty to ensure adequate devices to the State and the FHWA under the Section 130 program and permanently preempts the railroad's former tort-law duties: "[w]hat States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." *Id.* By rejecting federal preemption on the ground that even if—as is the case—the evidence established that federal funds were used to install an advanced warning sign at the Johnson Quarters Road, that sign may no longer exist, the court below blatantly contravened the rule in *Shanklin*. This Court should grant certiorari in order to make clear that, like with other changed circumstances claims, changes in the conditions of the crossing (such as the absence of warning devices that were previously installed) are not relevant to federal preemption analysis under FRSA and Section 646.214(b)(3) and (4).

Beyond demonstrating an unwillingness to follow this Court's binding precedent,[18] the decision below also undermines federal law and the purposes underlying FRSA

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[18] The Mississippi Supreme Court's refusal to correct language suggesting, in direct conflict with *Shanklin*, that federal preemption only occurs at high-risk crossings where active devices have been installed after diagnostic study likewise demonstrates disregard for this Court's holding. Citing to *Pearson* v. *Columbus & Greenville Railway*, 737 So. 2d 390 (Miss. Ct. App. 1998), the Mississippi Supreme Court stated that "[b]efore federal law will preempt a state law there must be proof that federal-aid funds were used in the installation of devices *including automatic gates with flashing light signals when one or more of several conditions exist*." App. 7a (emphasis added). This statement of law, which clearly conflicts with *Shanklin*, 529 U.S. at 355-56, underlies the Mississippi Supreme Court's ultimate decision to disregard McCormick's uncontradicted testimony. Indeed, despite being informed in KCS's motion for rehearing that its decision conflicts with *Shanklin* and with numerous courts, the Mississippi Supreme Court declined the opportunity to remedy, or even to address, these conflicts.

preemption of state law. Congress has expressly stated that a major purpose of FRSA and its accompanying regulations is to compel "national[] uniform[ity]" in the area of railroad safety where the Secretary of Transportation (acting through the FHWA) has established federal rules and standards. 49 U.S.C § 20106. Where federal standards are in place, preemption preserves the ability of railroads to operate in interstate commerce without being subject to the vagaries of variable state laws. Additionally, the Section 130 Crossings Program is a voluntary program that provides funding for railway-crossing warning devices while simultaneously giving states the duty to maintain those warning devices and removing the states' ability to "hold the railroad responsible for the adequacy of those devices." *Shanklin*, 529 U.S. at 358. To avoid these consequences, a state can refuse to participate in the Section 130 Crossings Program, but participation in the program is tantamount to acceptance of the Program's attendant duties and consequences.

As this Court made clear in *Shanklin*, in light of the State's ongoing duty to survey crossings and to devise projects to eliminate hazards, 23 U.S.C. § 130(d), "nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA." 529 U.S. at 358. Moreover, as in many other states, Mississippi state law obligates state and local authorities—not the railroads—to maintain traffic-control devices, like the railway warning device at issue in this case. See Miss. Code Ann. §§ 63-3-303, -305; see also *MUTCD* § 1A-3 ("The responsibility for the design, placement, operation and maintenance of traffic control devices rests with the governmental body or official having jurisdiction.").

If FRSA preemption turns on whether warning devices have been appropriately maintained, every railroad will be burdened with having to ensure on a constant basis that every

state or local authority has fulfilled its obligations to maintain the federally funded warning devices at every crossing in the railroad's system. It would be senseless and wasteful to impose a duplicative duty on railroads to inspect crossings (and the highway approaches to them); moreover, railroads have no power to compel the state or local government agency to supply needed signs on public roads, nor to install them independently. See *MUTCD* § 1A-3.1 ("Traffic control devices shall be placed only by the authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic."); see also Miss. Code Ann. §§ 63-3-303, -305 (giving authority to place and maintain traffic control devices solely to state and local authorities). It would be doubly senseless if the railroad's legal duties (and tort liability) turns on such happenstance as whether the state or locality has timely inspected or replaced missing signs.

Thus, if the Mississippi Supreme Court decision is permitted to stand, it will not only undermine the national uniformity in railway safety regulation expressly required by Congress, but it will also unfairly shift to the railroads enormous burdens that federal and, in many cases, state law allocate to the states and localities.

* * * * *

Despite Congress's express policy decision that federal funding of safety devices and accompanying federal preemption of state law is the best means to effect railway safety, some courts continue to try to evade the FRSA's preemptive effect. This Court should grant certiorari both to make clear that *Shanklin*'s holding regarding changed circumstances applies to claims that warning device were not properly maintained and to put a stop to the continued efforts to undermine FRSA and its accompanying regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 16, 2001

APPENDICES

APPENDIX A

SUPREME COURT OF MISSISSIPPI

No. 1999-CA-00505-SCT

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON.

Feb. 8, 2001

Before PITTMAN, C.J., SMITH and DIAZ, JJ.

SMITH, JUSTICE, FOR THE COURT:

On the Court's own motion, the prior opinions issued in this case are withdrawn, and this opinion is substituted therefor.

Kansas City Southern Railway appeals to this Court from a jury verdict rendered in Hinds County Circuit Court in favor of J.C. Johnson in the amount of $2.5 million and $1 million for Kerry Lynn Johnson. Judgment was entered based on the verdict. KCS subsequently moved for a judgment notwithstanding the verdict or a new trial. The circuit court denied this motion but ordered a remittitur of $500,000 on the damage award to Kerry Lynn Johnson. The remittitur was accepted. KCS promptly perfected this appeal.

This Court holds that the jury was properly instructed regarding damages for loss of enjoyment of life recoverable as a separate form of damages. We further hold that the trial court properly allowed the testimony of plaintiff's expert witness, Dr. Stan Smith. We therefore affirm the trial court.

STATEMENT OF THE FACTS

Viewed in the light most favorable to the Johnsons, the facts are as follows. On July 18, 1995, the vehicle driven by J.C. Johnson ("Johnson") was struck by KCS's eastbound 40-mile-per-hour freight train operated by its engineer, Cook. Before turning off to his right from U.S. Highway 80 some 68 feet north of the railroad crossing, Johnson had been traveling east on Highway 80, heading parallel with and in the same direction as the train, which, unknown to Johnson, was overtaking him from behind.

As Johnson headed up the steep, rough roadway slope of Johnson Quarters Road to the humpbacked summit of the crossing, unable to see oncoming vehicles on the other side of the tracks because of the severe grade, his view both up and down the tracks was seriously impaired by trees, bushes and other vegetation growing on KCS's right-of-way, which extended out 50 feet on either side of the track. There were no flashing lights or gates, or any other form of active protection, to warn motorists that a train was approaching this crossing at about 60 feet per second.

KCS's conductor seated on the left side of the locomotive cab testified that he saw Johnson as he turned off Highway 80 onto Johnson Quarters Road, when the train was about 300 feet away from impact. The engineer on the right side of the cab never saw Johnson's truck until somewhere between 100 to 150 feet. There was evidence that the train's horn was blown before the collision, but it was alleged that KCS's engineer had failed to blow his horn at a sufficient distance away from the crossing to give Johnson adequate warning that the 40 mph (60 feet per second) train was coming.

It is also alleged that KCS had not maintained the crossing nor adopted any reasonable policy relative to vegetation control to provide a clear sight distance to the motoring public to detect approaching high speed trains. As a result of

the railroad's negligence, in both crossing maintenance and train operation, Johnson contends he sustained severe and permanent injuries, consisting of a closed-head injury which has left him little more than a child. Johnson had a long history of employment and alleges he has suffered significant economic loss and medical expenses. Additionally, his wife suffered substantial loss of consortium.

After hearing the evidence, the jury found in favor of the Johnsons. KCS appeals to this Court and presented a number of issues for discussion.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN REFUSING TO TRANSFER VENUE TO THE CIRCUIT COURT OF RANKIN COUNTY.

II. WHETHER THE CIRCUIT COURT ERRED IN DENYING KCS'S MOTIONS FOR A DIRECTED VERDICT, PEREMPTORY INSTRUCTION, JUDGMENT NOTWITHSTANDING THE VERDICT, AND NEW TRIAL.

III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY REGARDING HEDONIC DAMAGES.

IV. WHETHER THE CIRCUIT COURT ERRED IN ALLOWING RECOVERY OF HEDONIC DAMAGES.

V. WHETHER THE CIRCUIT COURT ERRED IN GRANTING NUMEROUS JURY INSTRUCTIONS.

DISCUSSION OF LAW

I. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN REFUSING TO TRANSFER VENUE.

The Johnsons filed the present action against KCS, Illinois Central, and Cook in the Circuit Court of Hinds County. The circuit court denied the defendants' motion to transfer venue to Rankin County. On appeal, KCS argues that the circuit court erred in denying the motion.

"An application for a change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances of the case." *Beech v. Leaf River Forest Prods., Inc.*, 691 So.2d 446, 448 (Miss.1997) (quoting *Mississippi State Highway Comm'n v. Rogers*, 240 Miss. 529, 539-40, 128 So.2d 353, 358 (1961)). "The trial court must give the plaintiff the benefit of reasonable doubt with respect to the venue selection, and this Court must do the same on appeal." *Pisharodi v. Golden Triangle Reg'l Med. Ctr.*, 735 So.2d 353, 354 (Miss.1999) (citing *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1156 (Miss.1992)).

The railroad venue statute, Miss.Code Ann. § 11-11-5 (Supp.2000), provides as follows:

> Actions against any railroad . . . may be brought in the county where the cause of action accrued, in the county where the defendant has its principal place of business, or in the county in which the plaintiff resided at the time the cause of action accrued.

The cause of action in this case accrued in Rankin County, and the Johnsons resided in Rankin County. KCS argues that because its principal place of business is in Kansas City,

Missouri, and not in Hinds County, the circuit court improperly denied its request to transfer venue to Rankin County. The Johnsons assert that KCS's principal place of business is in Hinds County, its registered agent for service of process, as well as Illinois Central's principal place of business and its registered agent for service of process. KCS, however, denies this despite the fact that one of its employees testified that the main office of the railroad was located in Jackson.

In *Sawyer v. Illinois Cent. Gulf R.R.*, 606 So.2d 1069 (Miss.1992), this Court held that for purposes of the railroad venue statute, the principal place of business of Illinois Central was in Hinds County. In *Salts v. Gulf Nat'l Life Ins. Co.*, 743 So.2d 371, 374 (Miss.1999), this Court explained:

> In suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. This is true where the defendant upon whom venue is based is subsequently dismissed from the suit. In such situations, venue as to the remaining defendants continues despite the fact that venue would have been improper, if the original action had named them only.

KCS argues that this rule does not apply in the case at hand because the Johnsons' claim against Illinois Central was filed frivolously to establish venue in Hinds County. KCS's argument is not well-taken. After careful review, we find that venue was proper. The trial court had before it evidence that KCS's principal place of business was in Hinds County. We cannot say the trial court abused its discretion in denying the motion to transfer venue. Accordingly, this issue is without merit.

II. WHETHER THE CIRCUIT COURT ERRED IN DENYING KCS'S MOTIONS FOR A DIRECTED VERDICT, PEREMPTORY INSTRUCTION, JUDGMENT NOTWITHSTANDING THE VERDICT, AND NEW TRIAL.

This Court's standards of review for a denial of a judgment notwithstanding the verdict, a directed verdict, and a peremptory instruction are identical:

> Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Steele v. Inn of Vicksburg, Inc., 697 So.2d 373, 376 (Miss.1997). The trial judge properly denied the above motions, and the arguments that we should find otherwise are not persuasive. Evidence as to the hazardous conditions of the crossing as well as the adequacy of the sight distance were clearly questions for the jury.

KCS also claims that it would be proper to grant a new trial in light of the evidence in their favor and due to preemption of federal law. We disagree. This Court will reverse a trial court's denial of a request for new trial only when the denial amounts to a abuse of that court's discretion. *Id.* at 376 (citing *Shields v. Easterling*, 676 So.2d 293, 298 (Miss.1996); *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So.2d 129, 132 (Miss.1989)). The same arguments used in the paragraph

above can be made here as to the weight of the evidence, but whether we should be preempted by federal law should be addressed.

KCS consistently refers to an advanced warning sign for which federal funds were spent. A careful examination of the record reveals nothing but the reflective, cross-buck. While it is unclear as to which sign KCS is referring, it makes no difference. If it is a sign other than the cross-buck there is no evidence of its existence. If KCS is referring to the reflective cross-buck, there is lack of proof that federal funds were spent on its installation.

KCS also claims that *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); *Hester v. CSX Transp.*, 61 F.3d 382 (5th Cir.1995); and *Pearson v. Columbus & Greenville Ry.*, 737 So.2d 390 (Miss.Ct. App.1998), demonstrate that our laws are preempted by federal guidelines in this case. Again, we disagree. Before federal law will preempt a state law there must be proof that federal-aid funds were used in the installation of devices including automatic gates with flashing light signals when one or more of several conditions exist. *See* 23 CFR § 646.214(b) (2000).

Pearson stands for the proposition that there must be more than the existence of a plan in that the plan must also have been implemented. *Pearson*, 737 So.2d at 396. The court further stressed that mere expenditure of federal funds from whatever source or for whatever reason, does not trigger preemption. *Id.* KCS would like us to rely on the memory of one retired MDOT employee who claims to remember federal funds being spent at this particular crossing. We will not rule that federal funds have been spent where no documentation was produced in support thereof. There is no federal preemption in this case, and the matter is properly before this Court.

KCS also claims that Miss. Code Ann. §§ 63-3-303, 305 removes any and all responsibility from its shoulders and transfers the duty to the Mississippi Department of Transportation. Section 63-3-303 provides, in pertinent part:

> The commissioner of public safety and the state highway commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic.

Section 63-3-305 states:

> Local authorities in their respective jurisdictions shall place and maintain such traffic control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or provisions of local traffic ordinances or to regulate, warn, or guide traffic.

Nevertheless, §§ 77-9-247 and 248 (discussing installation of cross-bucks), § 77-9-251 (discussing duty of railroad in maintaining the grade), § 77-9-245 (duty to enclose depots), and § 77-9-253 (duty to maintain stock gaps and cattle guards) clearly refer to duties of the railroad in the interest of public safety. This refutes the point that KCS has no duty toward the public in operation of its railroad. However, foreseeability and breach of duty are issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case. *Lyle v. Mladinich*, 584 So.2d 397, 400 (Miss.1991).

III. WHETHER THE CIRCUIT COURT ERRED IN ALLOWING RECOVERY OF HEDONIC DAMAGES.

The loss of one's enjoyment of life continues to be an area of confusion in the state of Mississippi. The issue to be

decided here is whether our state will or will not recognize this type of recovery in a personal injury action, and if so to what extent? Jurisdictions around the country have chosen either; 1) not to recognize the loss of enjoyment of life, 2) recognize the loss of enjoyment of life as a completely separate element considered in addition to pain and suffering, or 3) recognize the loss of enjoyment of life but only as integrated into pain and suffering. *See e.g., Elliott v. United States*, 877 F.Supp. 1569 (M.D.Ga.1992); *Loth v. Truck-A-Way Corp.*, 60 Cal.App.4th 757, 70 Cal.Rptr.2d 571 (Cal.Ct.App.1998); *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 792 (Fla.1985) (recognizing as separate from pain and suffering); *Brookshire Bros., Inc. v. Wagnon*, 979 S.W.2d 343, 353 (Tex.Ct.App.1998) (recognizing as an element of pain and suffering); *Kirk v. Washington State Univ.*, 109 Wash.2d 448, 746 P.2d 285 (Wash.1987). Today we decide to follow the jurisdictions which recognize the loss of enjoyment of life.

The Court of Appeals has pointed out that there are no Mississippi cases directly on point on the question of whether loss of enjoyment of life is an element of damages in a survival personal injury action. *KM Leasing, Inc. v. Butler*, 749 So.2d 310 (Miss.Ct.App.1999). While we have not declared how to classify the loss of enjoyment of life, we have made clear that the damages to a particular plaintiff in a personal injury action should be decided on a case-by-case basis. *Kinnard v. Martin*, 223 So.2d 300, 302 (Miss.1969); *Mobile & Ohio R.R. v. Carpenter*, 104 Miss. 706, 61 So.2d 693 (1913); *Southern R.R. v. Kendrick*, 40 Miss. 374 (1866). We allowed recovery for all damages including those for partial loss of enjoyment of life in *W.J. Runyon & Son, Inc. v. Davis*, 605 So.2d 38, 50 (Miss.1992). This Court has also recognized damages for the loss of enjoyment of life in a number of other personal injury cases. *See Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1163 (Miss.1992) (recognized loss of enjoyment of life as a factor in determining jury award);

General Motors Corp. v. Jackson, 636 So.2d 310, 315 (Miss.1994) (holding award that included damages for loss of enjoyment of life not excessive); *Atwood v. Lever*, 274 So.2d 146, 149 (Miss.1973) (jury instruction on damages for loss of enjoyment of life recognized but found no facts in record to support award of damages based on loss of enjoyment of life.); *Haywood v. Collier*, 724 So.2d 1105, 1107 (Miss.Ct.App.1998).

Furthermore, we said that an injured plaintiff enjoys the right to damages such as will compensate him for all of his losses, past and future and is entitled to the present worth of all that has been forced upon him. *Davis*, 605 So.2d at 50. It was not, however, specified as to whether damages for loss of enjoyment of life were to be considered as part of or separate from those for pain and suffering.

The loss of enjoyment of life should be fully compensated and should be considered on its own merits as a separate element of damages, not as a part of one's pain and suffering. We decide to follow other jurisdictions which have held that damages for loss of enjoyment of life compensate the injured person for the limitations placed on his or her ability to enjoy the pleasures and amenities of life. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 715-16 (Tenn.Ct.App.1999) (citing *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir.1980)). This type of damage relates to daily life activities that are common to most people. There are numerous activities that courts have held constitute daily life activities: going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities. *See generally Nemmers v. United States*, 681 F.Supp. 567, 575 (C.D.Ill.1988); *Dyer v. United States*, 551 F.Supp. 1266, 1281 (W.D.Mich.1982); *Sweeney v. Car/Puter Int'l Corp.*, 521 F.Supp. 276, 288 (D.S.C.1981); *Overstreet*, 4 S.W.3d at 716. Pain and suffering encompasses the physical and mental discomfort caused by an injury, such as anguish, distress,

fear, humiliation, grief, shame, and worry. *Overstreet*, 4 S.W.3d at 715. A permanent injury differs from pain and suffering in that it is an injury from which the plaintiff cannot completely recover. *Id.* (citing *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618, 630 (W.Va.1974)).

Evidence was presented at trial that prior to the accident Mr. Johnson enjoyed hunting, fishing, and yard work. As a result of the accident, Johnson suffered brain injury, a cracked pelvis, bruised lungs, pneumonia, and was forced to move to an inpatient rehabilitation center for close to a year. Johnson also testified as to his inability to enjoy those activities in which he participated prior to the accident. His wrist has been damaged and one of his fingers remains crooked. Furthermore, there is evidence that Johnson has a diminished ability to speak. We find that the testimony of Mr. Johnson, Ms. Johnson, the physical therapist, the rehab specialist, the speech therapist, are ample to support damages for Johnson's lost ability to enjoy his prior life style. Johnson has demonstrated that he is conscious of his lost enjoyment of life's pleasures, and our tort system should compensate him for these losses. Perhaps most telling about the effects of the accident on Johnson's life is this testimony from Johnson's daughter, Angela: "I watched an active man sit in a wheelchair all day. I watched an articulate man who took pride in his vocabulary struggle to get one word out. And I have watched a person that was always happy look sullen and sad, stare out into space."

It is apparent that Johnson is no longer the person he was prior to the accident. We hold today that these restrictions are significant enough to warrant compensation as a separate and distinct element of damages.

We believe jury instruction P-11A was correctly given. The instruction at issue reads as follows:

> The Court instructs the jury that "damages" is the word which expresses in dollars and cents the injuries sustained by a plaintiff. The damages to be assessed by a jury in a personal injury case *cannot be assessed by any* fixed rule, but you are the sole judges as to the measure of damages in any case. Should your verdict be for the plaintiffs, you may consider the following factors in determining the amount of damages to be awarded as may be shown by a preponderance of the evidence: . . . 5.) Loss of enjoyment of Life, and 6.) The value of past, present and future physical pain and suffering and resulting mental anguish, if any.

This instruction adequately separates loss of enjoyment of life damages from pain and suffering. The instruction was a simple, appropriate way to place before the jury the issue of loss of the enjoyment of life as a distinct and separate element of damages which cannot be considered as pain and suffering. The trial court did not err in granting this instruction.

IV. WHETHER THE CIRCUIT COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY REGARDING LOSS OF ENJOYMENT OF LIFE.

At trial, KCS filed a motion *in limine* in an effort to exclude the testimony of Dr. Stan Smith. The claim was that an expert must have acceptance in the particular field to which it belongs, and, moreover, that the method by which his opinion was reached was not generally accepted in his field of expertise as required by M.R.E. 702. On appeal, KCS argues that the trial court erred in denying its motion *in limine*.

The admission of testimony is within the sound discretion of the trial court. *Roberts v. Grafe Auto Co.*, 701 So.2d 1093, 1098 (Miss.1997). Unless we conclude that the discretion was arbitrary and clearly erroneous, the decision will stand. *Id.*

(citing *Seal v. Miller*, 605 So.2d 240, 243 (Miss.1992); *Hooten v. State*, 492 So.2d 948, 950-51 (Miss.1986)).

Under Mississippi Rule of Evidence 702, expert testimony should be admitted only when the trial court can affirmatively answer a two-fold inquiry. First, the witness must be qualified as an expert because of the knowledge, skill, experience, training, or education he or she possesses. M.R.E. 702. *See also Watkins v. U Haul Int'l, Inc.*, 770 So.2d 970, 973 (Miss.Ct.App.2000). Second, the witness's scientific, technical, or other specialized knowledge must assist the trier of fact to understand or decide a fact in issue. *Id.* Rule 702 "does not relax the standard that the expert must indeed be qualified to speak an opinion on a matter within his alleged field of knowledge," nor does it "relax the requirement that the scientific principle from which the expert's opinion is derived 'must be sufficiently established to have gained general acceptance in the particular field to which it belongs'" M.R.E. 702 cmt. (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923)).

In *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court held that Federal Rules of Evidence 702 supersedes the former "general acceptance" test set forth in *Frye*. Mississippi, however, has not adopted the *Daubert* test, and continues to utilize the "general acceptance" test enumerated in *Frye* even after the adoption of Mississippi Rule of Evidence 702. *Gleeton v. State*, 716 So.2d 1083, 1087 (Miss.1998) (citing *Crawford v. State*, No. [sic] 716 So.2d 1028, 1046 (Miss.1998); *Polk v. State*, 612 So.2d 381, 390 (Miss.1992)).

In *Hooten v. State*, 492 So.2d 948 (Miss.1986), we reiterated the rule for expert witnesses stating, "it is not necessary that one offering to testify as an expert be infallible or possess the highest degree of skill; it is sufficient if that person possesses peculiar knowledge or information

regarding the relevant subject matter which is not likely to be possessed by a layman." *Id.* at 948 (citing *Henry v. State*, 484 So.2d 1012, 1015 (Miss.1986)).

Johnson contends that Smith's testimony assisted the trier of fact in determining the amount of loss suffered as a result of KCS's negligent conduct and thus meets the standards set forth in MRE 702 and *Frye*. We agree. Although there is some honest dispute as to whether Dr. Smith's testimony was generally accepted in his field, the question of whether the proffered witness had obtained the required degree of specialized knowledge within a particular field is a matter within the sound discretion of the trial court, and unless there is abuse of that discretion, his determination will not be disturbed on appeal. *Pharr v. Anderson*, 436 So.2d 1357, 1359 (Miss.1983) (collecting authorities).

The trial court did not abuse its discretion by allowing Dr. Smith to testify as he had qualified as an expert in over 100 cases. Three affidavits of noted economists were tendered opining that, "[c]alculations of loss of enjoyment of life damages are now widely accepted in the field of forensic economics." The railroad produced its own expert who testified that Dr. Smith's conclusions were unreliable, invalid, and speculative. It is the jury's duty to determine which expert's testimony is to be given the greater weight. We do not find today that the trial court abused its discretion by allowing this testimony.

CONCLUSION

Having held that damages for loss of enjoyment of life are recoverable as a separate form of damages, and that admission of the testimony of Smith was not error, we affirm the judgment of the trial court.

AFFIRMED.

PITTMAN, C.J., BANKS and McRAE, P.JJ., MILLS, WALLER, COBB, DIAZ and EASLEY, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

CAUSE NO. 96-90CIV

J.C. JOHNSON AND KERRY LYNN JOHNSON
Plaintiffs

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY
Defendant

ORDER

This cause having come on to be heard on Defendant Kansas City's Southern Railway Company's Motion For Judgment Notwithstanding the Verdict or a New Trial. And the Court, having considered said Motion finds the following:

1) The verdict of $2.5 million in favor of Plaintiff J.C. Johnson shall be upheld since it is supported by the evidence.

2) The $1 million verdict in favor of Plaintiff Kerry Lynn Johnson was influenced by bias and passion and was contrary to the overwhelming weight of the evidence presented at trail. This award shall be reduced to $500 thousand. This plaintiff shall have 30 days to accept or reject this remittitur. Should Plaintiff reject the remittitur, Plaintiff will be granted a new trial on the issue of damages only.

IT IS THEREFORE, ORDERED and adjudged that the Motion For Judgment Notwithstanding the Verdict is denied with regard to J.C. Johnson's judgment and sustained with

regard to Kerry Lynn Johnson's judgment as stated above. The Motion for New Trial is denied at this time.

THIS THE 4th day of March, 1999.

/s/ [Illegible]
Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

Civil Action
File No. 251-96-90-CIV

J.C. JOHNSON,

Plaintiff,

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY, AND WILLIAM L. COOK, III,

Defendants.

ORDER OVERRULLING DEFENDANT'S SUMMARY JUDGMENT MOTION ON GROUNDS OF PREEMPTION

This day this cause coming on for hearing on Motion of Kansas City Southern Railway Company and William L. Cook, III for Partial Summary Judgment as to Plaintiffs' signalization claims, on the ground that such claim is preempted by federal law, and on the further ground that said claim is preempted by state law, and the court having considered the briefs of the parties, together with argument by counsel, and having taken the matter under advisement and now being fully advised in the premises, finds that the Motion is not well-taken on either ground and should be overruled.

WHEREFORE, PREMISES CONSIDERED, IT IS HEREBY ORDERED that the Defendants' Motion for Summary Judgment as to the signalization claim based on the

grounds of federal preemption and state law preemption be, and hereby is, overruled.

SO ORDERED on this the 4th day of June 1998.

/s/ [Illegible]
Circuit Judge

APPENDIX D

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

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May 10, 2001

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 10th day of May, 2001.

Supreme Court Case # 1999-CA-00505-SCT
Trail Court Case # 2519690

Kansas City Southern Railway Company, Inc. v. J.C. Johnson and Kerry Lynn Johnson

Appellant's motion for rehearing is denied.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS*

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

APPENDIX E

STATUTES AND REGULATION

23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

* * * *

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 894; Pub.L. 88-157, § 4, Oct. 24, 1963, 77 Stat. 277; Pub.L. 89-574, §§ 5(a), 14, Sept. 13, 1966, 80 Stat. 767, 771; Pub.L. 91-605, Title I, § 136(a), (b), Dec. 31, 1970, 84 Stat. 1734; Pub.L. 93-87, Title I, §§ 114, 152(2), 156, Aug. 13, 1973, 87 Stat. 257, 276, 277; Pub.L. 95-599, Title I, §§ 113, 116(d), 141(f), (g), Nov. 6, 1978, 92 Stat. 2696, 2699, 2711; Pub.L. 96-106, § 3, Nov. 9, 1979, 93 Stat. 797; Pub.L. 97-424, Title I, § 110(a), Jan. 6, 1983, 96 Stat. 2105; Pub.L. 102-240, Title I, § 1016(c) to (f)(1), Dec. 18, 1991, 105 Stat. 1946; Pub.L. 104-59, Title III, §§ 304, 305(a), Nov. 28, 1995, 109 Stat. 579, 580; Pub.L. 105-178, Title I, §§ 1202(c), 1212(a)(2)(A), 1306, June 9, 1998, 112 Stat. 170, 193, 229.)

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings,

the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after

completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States.

The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway[1] crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

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[1] So in original. Probably should be "railroad-highway".

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159; Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980;

Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

23 U.S.C. § 409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[1] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170; Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978; Pub.L. 104-59, Title III, § 323, Nov. 28, 1995, 109 Stat. 591.)

49 U.S.C. § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

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[1] Probably should have a comma inserted.

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 866.)

23 C.F.R. § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices*, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, April 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]